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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

J. FRANCIS KICAK, Petitioner,

vs.

STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND OR ALTERNATELY, TO THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO.

J. FRANCIS KICAK
209 Ridge Avenue
Youngstown, Ohio
COUNSEL FOR PETITIONER.

THOMAS BEIL, Prosecuting Attorney
Mahoning County Courthouse
Youngstown, Ohio
Attorney for Respondent

February 22, 1960

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

J. FRANCIS KICAK, Petitioner,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

NO.....

J. FRANCIS KICAK — *PETITIONER*

vs.

STATE OF OHIO — *RESPONDENT*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND OR ALTERNATELY, TO THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO.

Citation to Opinions Below

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio in the cause entitled THE STATE OF OHIO, Appellee V. J. FRANCIS KICAK, Appellant. (Unofficial, see Appendix A). This judgment denied Petitioner's Application for rehearing of a final order overruling Petitioner's Motion for Leave to Appeal from the Court of Appeals of the Seventh Appellate District of Ohio. (See Appendix "B"). Said action by the Supreme Court affirmed, as it were, the opinion of the Court of Appeals, Seventh Appellate District, dated April 1, 1959. (Unofficial, see Appendix C).

Grounds on Which Jurisdiction Of This Court Invoked

The decision of the Supreme Court of Ohio denying the Application for rehearing on its decision entered November 4, 1959, overruling the Petitioner's Motion for Leave to Appeal, was dated November 25, 1959.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

It is maintained that Ohio Revised Code Section 2945.79 so interpreted by the Supreme Court as to grant discretion to the trial court to deny Petitioner's motion for new trial, following a verdict, where Petitioner submitted in support of said Motion the sworn recantation of all the state's witnesses, upon whose testimony he was convicted, deprived him of his rights under the Federal Constitution. (See Appendix D).

Question Presented

By reason of the Court's construal of Ohio Revised Code Section 2945.79 *supra* to mean that the trial court has discretionary power to deny a defendant's motion for new trial, after a verdict of conviction, where said defendant, in compliance with the procedural provisions of said statute, submitted to the trial judge in support of said motion and during the hearing thereon, the recantation of all of the State's witnesses without whose testimony, the testimony of at least one that is, a conviction could not have been sustained as a matter of law, renders said statute, as interpreted, violative of the provisions which comprise the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that the defendant has been denied his day in court?

Our question then, specifically, is whether the Statute is unconstitutional in that, as interpreted, it vests in the judiciary an arbitrary power and discretion over matters protected by the Federal Constitution.

Constitutional and Statutory Provisions Invoked

This case involves the Fourteenth Amendment to the Constitution of the United States.

The case also involves Ohio Revised Code Section 2945.79, which governs the matter of when a trial court, in a criminal case, may grant or deny a new trial following a verdict of conviction (Appendix D).

Ohio Revised Code Section 2903.01 is indirectly involved as it defines the crime for which the Petitioner was convicted (Appendix E).

Statement of the Case

On February 7, 1958, the Mahoning County Grand Jury returned an indictment charging that the Petitioner unlawfully and willfully did take indecent and improper liberties with the person of one Nancy Lee Hull, a female person, aged fifteen (15) years, without committing or intending to commit the crime of rape upon her in violation of the felony described in Revised Code Section 2903.01. Thereafter, upon arraignment, petitioner entered a plea of not guilty and on September 15, 1958, following his submission of a waiver of trial by jury, the case was tried to the Honorable D. G. Jenkins, one of the Judges of the Common Pleas Court of said County.

During the trial just three witnesses testified in behalf of the state, namely, the alleged victim, Nancy Lee Hull, her mother, Ruth Hull, and the alleged victim's sister, Barbara Hull, aged thirteen. The testimony was all to the effect that the petitioner did touch the vagina of the alleged victim and that this touching occurred in the presence of the other two witnesses. The defendant denied that this ever occurred and so testified.

On the basis of the testimony mentioned, the court returned a verdict of guilty. Thereafter, defendant filed a Motion for new trial, and in compliance with the procedural provisions of revised Code Section 2495.79, submitted to the court in support of the Motion, the sworn statement of

each of the state's witnesses named, which statements said, unequivocally, that the petitioner never did touch the person of the alleged victim; that each said witness had lied during the trial; and further, each statement contained a recitation of the motive for lying.

The trial court overruled the Motion for new trial. (Appendix F).

It is elementary that had the three witnesses testified as they did in their sworn statements a conviction of the petitioner would have been impossible.

State of the Record When Federal Question Raised

The trial court refused to grant the petitioner a new trial so that the fact of recantation by all of the State's witnesses might be introduced in evidence.

The Court of Appeals, considered that such action on the part of the trial judge did not constitute an abuse of discretion, although one of the judges, in a separate concurring opinion stated:

> "*I have a strong feeling that with the sworn recantations * — there is a very strong possibility that there would be a different verdict, if this case were retried in the Common Pleas Court** (Appendix C).

In the Assignment of Errors (No. 3) in the Ohio State Supreme Court, the defendant, petitioner herein, first raised the question of due process (Appendix G).

ARGUMENT

Circumstances Relied on for Allowance of the Writ

It is a fundamental principle of criminal law, in Ohio, by statute, Revised Code Section 2945.04, that the state must prove the defendant's guilt beyond a reasonable doubt (Appendix H).

Accordingly, had the fact of recantation of all the state's witnesses been introduced in evidence on the occasion of the trial there could not have been a conviction.

It is basic that a legislature cannot invest a court with such a degree of power as to divest a citizen of his rights, whenever in the exercise of its discretion, it, the courts, sees fit to do so. Further it is basic, that the right of a citizen to due process of law must rest on a basis more substantial then favor or discretion. This principle was advanced in Roller vs. Holly 176 U. S. 398, 44 L. Ed. 520. (Appendix H).

It is contended that in the event of failure on the part of one of the state's witnesses to recant, the delegation by the legislature to a court to exercise discretion would not constitute an arbitrary power. This specific principle was considered by the Supreme Court of Virginia in Powell vs Commonwealth of Virginia, 133 V.A. 741. (Appendix H).

In the case at bar, however, there was a recantation by all of the state's witnesses. Clearly, then, it is a situation "of favor of discretion" and for the courts to construe, as a matter of statutory construction, as is the situation in this case, the Statute as having that effect, is clearly indicative of usurpation, and the petitioner has been denied his constitutional rights.

Respectfully submitted,

J. FRANCIS KICAK
Attorney for Petitioner
207 Ridge Avenue,
Youngstown, Ohio

RECEIPT OF COPY OF THE FOREGOING PETITION ACKNOWLEDGED THIS 22nd DAY OF FEBRUARY, 1959.

THOMAS A. BEIL
Prosecuting Attorney
Attorney for Respondent

APPENDIX A

The State of Ohio
County of Franklin

The Supreme Court of the State of Ohio of the term of January, A.D. 1959

To-wit: Wednesday, November 4, 1959

State of Ohio
Plaintiff-Appellee
vs
J. Francis Kicak
Defendant-Appellant

No. 36193

Entry [redacted]tion for Leave to Appeal from the Court of Appeals of Mahoning County

It is ordered by the Court that this motion be, and the same hereby is overruled.

THE COURT

APPENDIX B

The State of Ohio
County of Franklin

The Supreme Court of the State of Ohio of the term of January, A.D. 1959

To-Wit: November 25, 1959

State of Ohio
Plaintiff-Appellee
vs
J. Francis Kicak
Defendant-Appellant

No. 36193

Entry on Application for Rehearing on Motion for Leave to Appeal from the Court of Appeals of Mahoning County, Ohio.

It is ordered that this Application be and the same is hereby overruled.

THE COURT

APPENDIX C

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

State of Ohio,
Plaintiff-Appellee,

-vs-

J. Francis Kicak,
Defendant-Appellant.

OPINION

Case No. 4035

APPEARANCES.

Thomas A. Beil, Prosecuting Attorney, and Clyde Osborne and Thomas L. Corroto, Assistant Prosecuting Attorneys, Youngstown, Ohio, for Plaintiff-Appellee.

D. F. Rendinell, Youngstown, Ohio, and Walter I. Krewson, Cleveland, Ohio, for Defendant-Appellant.

Hon. Lynn B. Griffith,
Hon. Elmer T. Phillips,
Hon. John L. Donahue, JJ.

Dated: April 1, 1959

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

PHILLIPS, J.,

Upon waiver of trial by jury a judge of the court of common pleas found defendant guilty of unlawfully and willfuily taking "indecent and improper liberties with the person of one Nancy Lee Hull, then and there being a female person under the age of sixteen years, to-wit: the age of fifteen years, the said J. Francis Kicak without committing or intending to commit the crime of rape upon her, the said Nancy Lee Hull, contrary to the statute in such cases made and provided and against the peace of the State of Ohio".

The trial judge fined defendant $500.00 and costs and entered judgment accordingly, from which judgment defendant appealed to this court on questions of law.

There is evidence that during a visit of the complainant with her sister, mother and grandfather to the office of the defendant, aged fifty-nine years, on a Sunday afternoon defendant during the absence of the grandfather, who was ordered out of defendant's office, wanted to know how the mother and sister were doing and everything and "we told him 'yes'; that he wanted to know if we was clean and we told him, 'yes'; that he "called one of us at a time and told me to pull down my pants, then he put his finger up my private parts and wanted to know if I was clean".

There is conflicting and contradictory testimony of complainant's unwed mother, who was the mother of seven children born out of wedlock, and the frank testimony of her sister, Barbara, aged thirteen, all of such a nature as to compel the trial judge to remark:-

> "I think that's enough, and make your cross-examination short, I believe this child. I don't want to put her under any further torture, I believe her and that's that. Just don't be, — you handle her right."

Defendant contends that by this remark the trial judge obviously "having concluded in the morning of the the only trial day and before recess that the defendant was guilty, not useful purpose was served in the presentation of the defense because the court had closed its mind with the conclusion and finding that 'I believe this child and that's that'."

We do not so conclude by reason of the following paragraph of the syllabus in the case of Crosby v. State, 9 Ohio Law Abstract 55:-

> "Expression by trial judge that he did not believe the testimony of a witness is not reversible error where the cause is not tried before a jury."

Defendant's secretary testified as to an absence of a record of a visit at defendant's office at the time the alleged assault occurred.

A roofer roofing the building in which defendant's office was situated testified that on Labor Day 1957, a day other than the day of the alleged assault, that defendant and complainant's mother were arguing:-

> "Q. What were they doing?
>
> A. I could see they were arguing about money, what the money was about I don't know, as they went out the door I heard something about fifteen hundred dollars shaking down."

Defendant denied specifically the quoted testimony, and testified that complainant's mother and her daughters and father did not visit him in May of 1957, (the day of the alleged assault); that he remembered such to be a fact because he was ill with a "heart attack"; that at no time did he assault Nancy Hull as charged in the indictment; that while they (Ruth Hull and her father) "were at my

office they wanted me to advance them money or give them some money, wherein they began to threaten me if I didn't take care of the hospital bill, 'I would be sorry.' And then, they walked out of the house many a time in a fit of anger, they were going to cost me a lot of money and cite me before the bar association".

Defendant's brother generally supported defendant with reference to the presence of complainant, her mother, sister and grandfather at defendant's office on the day of the alleged assault.

The evidence is such that we cannot and will not reverse the judgment of the trial judge on the grounds that he erred to defendant's prejudice in the admission of evidence, and that his judgment was not supported by the weight of the evidence.

Now with reference to claimed error prejudicial to the defendant committed by the trial judge in overruling defendant's motion for a new trial on the ground that complainant was heard to say just outside the court room where defendant was tried "I want to go to tell them its a lie, its a lie, and I want to tell the truth."

In the case of State v. Curnutt, 84 Ohio App. 101, the third paragraph of the syllabus states:-

> "Where a new trial is sought upon the ground that a witness subsequently stated that he gave perjured testimony, the question is, when did the witness tell the truth? Recantation, by an important witness of his or her testimony at the trial does not necessarily, or as a matter of law, entitle the defendant to a new trial. The determination of such matters rests in the sound discretion of the trial court, whose action will not be set aside except for clear and manifest abuse."

In the case of State v. Lopa, 96 Ohio St, 410, the court, at page 411, said:-

> "The granting of a motion for a new trial upon the ground named is necessarily committed to the wise discretion of the court, and a court of error cannot reverse unless there has been a gross abuse of that discretion. And whether that discretion has been abused must be disclosed from the entire record. The rule of procedure in this regard has been frequently announced by this court. The new testimony proffered must neither be impeaching nor cumulative in character. Were the rule otherwise the defendant could often easily avail himself to a new trial upon the ground claimed. Unless the trial court or court of error, in view of the testimony presented to the court and jury, finds that there is a strong probability that the newly discovered evidence will result in a different verdict, a new trial should be refused."

We cannot reverse the judgment of the trial judge on the ground of newly discovered evidence in the absence of a clear showing of abuse of discretion, which we do not find.

We are unable to subscribe to the charge that the trial judge abused his discretion when the Supreme Court in defining "abuse of discretion" stated:-

> "'a view or action 'that no conscientious judge acting intelligently, could honestly have taken.' Long v. George, 296 Mass., 574, 579, 7 N.E. (2d), 149, 151. 'Steiner v. Custer, et al 137 Ohio St. 448 at page 451.'"

Appellant's counsel has failed to call our attention to "other errors manifest upon the face of the record prejudicial to the rights of defendant by which defendant was pre-

vented from having a fair and impartial trial" as alleged as grounds of error, or to comply with respect thereto with the provisions of Rule VII of this court that his briefs "shall contain a statement of the questions presented and a succinct statement of so much of the cause, referring to the pages of the record, as may be necessary to show how the questions arise, together with a statement of the authorities relied upon". Accordingly we will not pass upon this assigned ground of error.

The judgment of the trial judge is affirmed.

Griffith, P.J., Concurs.

Donahue, J., Concurs.

APPROVED:

.....

Judge.

DONAHUE, J., CONCURRING

While concurring with the majority opinion, I have a strong feeling that, with the sworn recantations and re-recantations of the minor children, and re-re-cantations of Ruth Hull, there is a very strong possibility that there would be a different verdict, if this case were retried in the Common Pleas Court, especially if such trial were before a jury. Perhaps even, if counsel had investigated further before this trial, and the presentation of evidence, a different result might have been reached. But I cannot quite bring myself to say that, as of now, a "probability" of a different verdict exists. Therefore I must concur with the decision here.

APPENDIX D.

OHIO REVISED CODE 2945.79
CAUSES FOR NEW TRIAL

A new trial, after a verdict of conviction, may be granted on the application of the defendant for any of the the following causes affecting materially his substantial rights:

(A) Irregularity in the proceedings of the court, jury, prosecuting attorney, or the witnesses for the state, or for any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial;

(B) Misconduct of the jury, prosecuting attorney, or the witnesses for the State;

(C) Accident or surprise which ordinary prudence could not have guarded against;

(D) That the verdict is not sustained by sufficient evidence or is contrary to law; but if the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and pass sentence on such verdict or finding as modified, provided that this power extends to any court to which the cause may be taken on appeal;

(E) Error of law occurring at the trial;

(F) When new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing of said motion, in support thereof, the affidavits of the witnesses by

whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as under all the circumstances of the case is reasonable. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

APPENDIX E

OHIO REVISED CODE 2903.01
ASSULT UPON A CHILD UNDER SIXTEEN YEARS

No person over the age of eighteen years shall assault a child under the age of sixteen years, and willfully take indecent and improper liberties with the person of such child, without committing or intending to commit the crime of rape upon such child, or willfully make improper exposures of his person in the presence of such child.

Whoever violates this section is guilty of felonious assault and shall be fined not less than one hundred nor more than one thousand dollars or imprisoned not less than one nor more than ten years, or both.

APPENDIX F

IN THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO

STATE OF OHIO	*Plaintiff*	NO. 19960
vs		
J. FRANCIS KICAK	*Defendant*	OPINION

THE COURT: The defendant, through his counsel, had the case transferred to this court. They showed faith in this court by the defendant, in writing, as the statute required, waiving his right to a jury. I am the jury as well as the judge, and now I am asked, because I happened to be both judge and jury, to do what I don't think I could do if it had been a jury trial and a jury had unanimously determined this. Be that as it may, I am bound by the law of Ohio, I am just an agent of the law, and the law has its machinery here and tells me how I have to operate and I cannot operate outside of the law.

I am now hearing a motion for a new trial on the ground of newly discovered evidence, and the law tells me exactly how that evidence shall be presented. It can only be by affidavit and deposition, so if these things are not affidavits and depositions I cannot even read them.

Now, what is newly discovered evidence requiring a new trial? It is not the attacking of the bona fides of testimony at the trial. It is the bringing forth of witnesses who, if they had been in the trial, would have required a different result. That is all it is. And this does not have anything to do with that, it is all an impeachment, back and forth, back and forth. I lied, I didn't lie, I lied, I didn't lie. If we resort to

this sort of thing there would never be an end to the processes of law, never. I take the responsibility for what is done here because I was jury and I am judge. I will take squarely the responsibility.

There is only one question in this situation; did these little girls tell the truth to me on the witness stand? That is all, and not what they say now or what somebody else has said. Did they lie to me on the witness stand? I have been on this seat a good many years, I have listened to thousands of witnesses, and not merely witnesses who talk to a jury but to me, and here I was the jury; and from all the years of training I have had in this work I know children, I know the truth, I know lies and I know liars.

I know, and I said at the time I rendered my judgment, those little girls could not have concocted that story, could not merely told that story. On the stand they told me the truth; I don't know what they have said since, I don't care. As a jury I had no doubt whatever that they told the truth, I still have no doubt.

I overrule this motion, there is nothing to it. I am going to get rid of this matter, and I am going to let you take the record to some other court to find whether I have abused my discretion, but I have not dodged any responsibility.

Do you have anything to say why the sentence of the court should not be pronounced, I have overruled the motion.

MR. KREWSON: May the record show an exception?

THE COURT: Certainly, you can have all this reviewed. I want to say something before I pass sentence. I am very well aware that this crime is of such a wide scope in variations that the penalty shows the legislature had in mind the scope of those variations because a court can fine him

a hundred dollars upon conviction or send him to the penitentiary for ten years. That is a wide scope, isn't it?

Therefore, the court takes into consideration what he found to have been the testimony bearing on this crime and his character, and this court takes into consideration, too, this defendant is a member of the Bar, and that a conviction will be automatically the basis for a disbarment; I know that, we all know it. I am taking all that into consideration in what I am going to do. Further, I want to say before I give my sentence that if the defendant in writing will at this time make application under Sec. 2949.2, I will fix the bond so that there can be an immediate review of this conviction.

DAVID G. JENKINS
Judge

APPENDIX G

STATE OF OHIO
COUNTY OF MAHONING
SS
STATE OF OHIO
APPELLEE

vs

J. FRANCIS KICAK
APPELLANT

IN THE SUPREME COURT

CASE NO. 36193

ASSIGNMENT OF ERRORS

Appellant complains of prejudicial errors in the following respects:

1. The Court of Appeals erred in affirming the final order of the Common Pleas Court in overruling the appellant's Motions for a new trial.
2. The Court of Appeals erred in not reversing the trial court's final order refusing to grant a new trial as said trial court abused its discretion in not granting said new trial.
3. The Court of Appeals erred in affirming the final order of the trial court in not granting appellant a new trial as such action by the trial court denied the appellant his constitutional rights.
4. Other errors of law occuring at the trial of said cause prejudicial to the rights of the defendant (appellant) by which defendant was prevented from having a fair and impartial trial.
5. Other errors manifest upon the face of the record.

APPENDIX H

ROLLER v. HOLLY

176 U. S. 398

44. L. Edition 520

This case involved a policy adopted by a court as to when service of summons might be deemed effected where the Statute spoke of terms of a reasonable time. The court took the position as stated at Page 409 of the opinion to wit:

> "The right of a citizen to due process of law must rest upon a basis more substantial then favor or discretion.
>
> That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of law to which no citation of liberty would give additional weight."

POWELL VS COMMONWEALTH OF VIRGINIA

133 Va. 741

Syllabus 5

> "The rule that a new trial will not be granted for perjured testimony if, after eliminating it, sufficient evidence remains to support the verdict, does not apply unless the court can fairly conclude that the jury would have come to the same conclusion had the perjured testimony been absent."

Discretion to the extent indicated, the court felt, where at least some testimony in support of the charge remained unrecanted, constituted a sufficient legal basis upon which an exercise of discretion might be effected, would be in proper order.

Ohio Revised Code Section 2945.04

Reasonable Doubt

A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. This presumption of innocence places upon the state the burden of proving him guilty beyond reasonable doubt.

Reasonable doubt is defined as follows: "It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

In charging a jury the trial court shall state the meaning of presumption of innocence, and read said definition of reasonable doubt.